Mohd Zandere bin Arifin v Public Prosecutor

HIGH COURT (KUALA TRENGGANU) — CRIMINAL APPEAL NO 42–16 OF 2004
AHMAD MAAROP J
28 SEPTEMBER 2005

Criminal Procedure — Sentence — Appeal against — Incest — Whether sessions court judge erred in principle in imposing on appellant the sentences appealed against — Whether there was a failure on the learned sessions court judge's part to apply the right principle — Penal Code s 376B

On 11 July 2004, the Welfare Officer of Hulu Terengganu ('the complainant') received a telephone call from a sister at the maternity ward, Hulu Terengganu Hospital informing her that the victim, Siti Nursapura bte Mohd Zandere (aged 13 years and 6 months) was admitted into the said ward on the same date, after having given birth to a baby boy on the same date. The complainant proceeded to the said ward and interviewed the victim. The victim told the complainant that the baby boy was born as a result of sexual intercourse between her and her father ('the appellant'). On the same date, the complainant lodged a police report. Investigation also revealed that the appellant had married the victim's mother. The victim was the eldest of the five children of the said marriage. Blood specimens of the appellant, the victim and the newly born baby boy were sent to Jabatan Kimia Malaysia, Petaling Jaya for DNA analysis. The results of the analysis indicated that the appellant was the biological father of the baby boy. The appellant was charged with three counts of incest, punishable under s 376B of the Penal Code ('the Code'). The appellant pleaded guilty to all the charges. The learned sessions court judge accepted the appellant's plea of guilty, found him guilty and convicted him on each of the three charges. After hearing the appellant's plea in mitigation, the learned sessions court judge sentenced the appellant to 18 years' imprisonment and three strokes of the rotan on each of the three charges. The learned sessions court judge ordered the sentences on the three counts to run consecutively. The appellant prayed that the sentences on him be reduced and be ordered to run concurrently.

Held, dismissing the appeal:

(1) Although the victim in the three charges was the same and although the offences were perpetrated at the same place, they were perpetrated on three different dates within the period of about seven months. The sentences passed must truly reflect the fact that in this case the appellant had committed three distinct offences of incest and that he was being duly punished for the three distinct offences. This could only be achieved by ordering the three sentences to run consecutively (see para 26).

(2) Although the term of 18 years imprisonment imposed on each count was almost the maximum sentence which could be imposed for an offence of incest under s 376B of the Code, this must be balanced against the very grave nature of the offences committed by the appellant and the demand of public interest on this type of offences. There is nothing in the Code or the Criminal Procedure Cope to explain what sort of incest could be categorised as the worst possible example of the offence of incest under s 376B of the Code. What could be considered as the worst possible example of the offence of incest under s 376B would depend on the facts and circumstances of each case. The offences committed by the appellant were among the worst kind under s 376B of the Code. The appellant had not given any explanation as to why he committed the offences which could operate significantly to reduce the sentence. The offences committed by the appellant which by their very nature were despicable, were aggravated by the fact that he was not a bachelor or a person who had never experienced or tasted the sweetness of a married life. He had been a married man about 12 years before the incest in the first charge was committed, and he was still married to the victim's mother on the date the three offences were committed (see paras 26–27).

(3) The offences committed by the appellant had outraged the feeling of the community, warranting even the maximum sentences to be imposed on him. Furthermore the prevalence of this type of offence must also be taken into consideration by the court in assessing sentence. Public interest demands that sentences which showed the society's utter abhorrence for this type of offence be passed. The sentences passed must serve as a plain warning that in this country the severest possible penalty awaits any person who commits incest. The element of public interest and the consideration that the offences committed by the appellant were very grave must prevail, and override the crushing effect which the sentences will have on the appellant (see para 28).

(4) The guilty plea of the appellant as well as all other aspects of his plea in mitigation was considered by the learned sessions court judge in assessing the sentences. The learned sessions court judge had not erred in principle in imposing the sentences he did on the appellant (see para 30).

[Bahasa Malaysia summary

Pada 11 Julai 2004, Pegawai Kebajikan Hulu Terengganu ('pengadu') telah menerima panggilan telefon daripada seorang ketua jururawat di wad bersalin, Hospital Hulu Terengganu memaklumkannya tentang si mangsa, Siti Nursapura bte Mohd Zandere (berumur 13 tahun dan 6 bulan) telah dimasukkan ke wad tersebut pada hari yang sama, selepas melahirkan seorang bayi yang lahir pada hari yang sama. Pengadu telah pergi ke wad tersebut dan menyoal si mangsa. Si mangsa memberitahu pengadu bahawa bayi lelaki itu dilahirkan hasil perhubungan seksual antaranya dan bapanya ('perayu'). Pada tarikh yang sama, pengadu telah membuat laporan polis. Siasatan juga menunjukkan bahawa perayu telah berkahwin dengan ibu mangsa. Si mangsa merupakan anak sulong daripada lima orang anak daripada perkahwinan tersebut. Spesimen darah perayu, mangsa dan bayi yang baru dilahirkan telah dihantar ke Jabatan Kimia Malaysia, Petaling Jaya untuk analisis DNA. Hasil analisis itu

menunjukkan bahawa perayu adalah bapa biologi bayi lelaki itu. Perayu telah dituduh atas tiga pertuduhan sumbang mahram, yang boleh dijatuhkan hukuman di bawah s 376B Kanun Keseksaan ('Kanun tersebut'). Perayu telah mengaku bersalah terhadap semua pertuduhan. Hakim mahkamah sesyen yang bijaksana telah menerima pengakuan bersalah perayu, mendapatinya bersalah dan menyabitkan ke atasnya untuk setiap tiga pertuduhan itu. Selepas rayuan mitigasi perayu, hakim mahkamah sesyen yang bijaksana telah menjatuhkan hukuman 18 tahun penjara dan tiga kali sebatan rotan ke atas perayu untuk setiap tiga pertuduhan. Hakim mahkamah sesyen yang bijaksana telah memerintahkan hukuman-hukuman tiga pertuduhan tersebut berjalan berturut-turut. Perayu telah memohon agar hukuman-hukuman ke atasnya dikurangkan dan diperintah berjalan serentak.

Diputuskan, menolak rayuan tersebut:

(1) Meskipun mangsa dalam ketiga-tiga pertuduhan adalah yang sama dan meskipun kesalahan-kesalahan tersebut dilakukan di tempat sama, ia berlaku pada tiga tarikh berbeza dalam tempoh lebih kurang tujuh bulan. Hukuman-hukuman yang diberikan hendaklah menggambarkan hakikat bahawa dalam kes ini perayu telah melakukan tiga kesalahan sumbang mahram yang berbeza dan bahawa beliau hendaklah dihukum untuk ketiga-tiga kesalahan yang berbeza tersebut. Ini hanya boleh dilaksanakan dengan memerintahkan ketiga-tiga hukuman itu berjalan berturut-turut (lihat perenggan 26).

(2) Meskipun tempoh 18 tahun penjara yang dikenakan ke atas setiap pertuduhan hampir merupakan hukuman maksimum yang boleh dikenakan untuk kesalahan sumbang mahram di bawah s 376B Kanun tersebut, ia hendaklah diimbangi dengan sifat serius kesalahan yang dilakukan oleh perayu dan tuntutan kepentingan awam berhubung kesalahan jenis sebegini. Tiada apa-apa dalam Kanun tersebut atau Kanun Acara Jenayah yang menjelaskan jenis sumbang mahram bagaimana yang boleh dikategorikan sebagai contoh yang paling teruk suatu kesalahan sumbang mahram di bawah s 376B Kanun tersebut. Apa yang boleh dipertimbangkan sebagai contoh yang paling teruk kesalahan sumbang mahram di bawah s 376B bergantung kepada fakta-fakta dan keadaan setiap kes. Kesalahan-kesalahan yang dilakukan oleh perayu adalah antara jenis yang teruk di bawah s 376B Kanun tersebut. Perayu tidak memberikan apa-apa penjelasan kenapa beliau melakukan kesalahan-kesalahan tersebut yang nyata sekali dapat mengurangkan hukuman. Kesalahan-kesalahan yang dilakukan oleh perayu mengikut sifatnya adalah perbuatan yang keji, adalah lebih teruk kerana hakikatnya beliau bukan seorang bujang atau seorang yang tidak pernah mengalami kemanisan hidup berumahtangga. Beliau seorang lelaki yang telah berkahwin hampir 12 tahun sebelum sumbang mahram dalam pertuduhan pertama dilakukan, dan beliau masih berkahwin dengan ibu si mangsa sehinggalah tarikh ketiga-tiga kesalahan tersebut dilakukan (lihat perenggan 26–27).

(3) Kesalahan-kesalahan yang dilakukan oleh perayu telah menyebabkan perasaan marah dalam masyarakat, mewajarkan hukuman maksimum dikenakan ke atasnya. Bahkan kewujudan kesalahan seperti ini juga hendaklah

diambilkira oleh mahkamah dalam memberikan hukuman. Kepentingan awam menuntut agar hukuman yang menunjukkan perasaan benci masyarakat untuk kesalahan sebegini hendaklah diberikan. Hukuman yang diberikan hendaklah memberikan amaran bahawa dalam negara ini penalti yang paling berat menanti sesiapa yang melakukan sumbang mahram. Elemen kepentingan awam dan pertimbangan bahawa kesalahan yang dilakukan oleh perayu adalah serius hendaklah kekal, dan mengatasi kesan hukuman-hukuman tersebut ke atas perayu (lihat perenggan 28).

(4) Pengakuan bersalah perayu dan juga semua aspek rayuannya dalam mitigasi telah dipertimbangkan oleh hakim mahkamah sesyen yang bijaksana dalam memberikan hukuman-hukuman itu. Hakim mahkamah sesyen yang bijaksana tidak terkhilaf secara prinsipnya dalam menjatuhkan hukuman-hukuman yang beliau berikan ke atas perayu (lihat perenggan 30).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3150–3191.

Cases referred to

Abu Bakar bin Alif v R [1953] MLJ 19 (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Leo Say v PP [1985] 2 CLJ 155 (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14 (refd)
Loh Hock Seng & Anor v PP [1990] 2 MLJ 13 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
R v Ball [1935]35, Cri App R 164 (refd)
R v Davies (1978) 667 Cr Appeal Report 207 (refd)

Legislation referred to

Penal Code s 376B
Terengganu Administration of Family Law Enactment 1985 s 24

Ahmad Maarop J:

[1] The appellant was charged with the following three counts of incest — offences punishable under s 376B of the Penal Code:

Pertuduhan 1

Bahawa kamu di antara 16 Oktober 2003 hingga 30 Oktober 2003 waktu malam di rumah No 4 Pelandan Tersat, di dalam Daerah Hulu Terengganu, di dalam Negeri Terengganu telah melakukan sumbang mahram iaitu bersetubuh dengan Siti Nursapura bte Mohd Zandere KPT: 911128–11–5550, seorang perempuan yang tidak boleh dikahwini. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376B Kanun Keseksaan.

Pertuduhan 2

Bahawa kamu pada bulan April 2004, waktu malam, di rumah No 4 Pelandan Tersat, di dalam Daerah Hulu Terengganu, di dalam Negeri Terengganu telah melakukan sumbang mahram iaitu bersetubuh dengan Siti Nursapura bte Mohd Zandere KPT: 911128–11–5550, seorang perempuan yang tidak boleh dikahwini. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376B Kanun Keseksaan.

Pertuduhan 3

Bahawa kamu pada bulan Mei 2004, waktu malam, di rumah No 4 Pelandan Tersat, di dalam Daerah Hulu Terengganu, di dalam Negeri Terengganu telah melakukan sumbang mahram iaitu bersetubuh dengan Siti Nursapura bte Mohd Zandere KPT: 911128–11–5550, seorang perempuan yang tidak boleh dikahwini. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376B Kanun Keseksaan.

[2] On 29 September 2004, the three charges were read to the appellant. He understood the charges. He pleaded guilty to all the charges and he understood the nature and consequences of his plea. Brief facts of the case (exh P1) were presented by the prosecution.

[3] The following exhibits were also tendered in evidence by the prosecution:

(a) Kuala Berang Report No 854/2004 (exhs P2),

(b) Birth certificate of the victim in this case (exh P3),

(c) The Nikah Certificate No 12698 issued under s 24 of the Terengganu Administration of Family Law Enactment 1985, certifying the marriage between the appellant and one Ramlah bte Taib (the victim's mother) on 20 August 1991 (exh P4),

(d) Medical report of the victim dated 23 September 2004 issued by Dr Mahani bte Nordin, Medical Officer, Hulu Terengganu Hospital,

(e) Chemist report dated 22 July 2004 relating to DNA analysis of the blood specimens of the appellant, the victim and the baby boy delivered by the victim on 11 July 2004.

[4] All these exhibits were admitted by the appellant.

[5] The facts of the case from exh P1 are as follows:

[6] On 11 July 2004, at about 10.45am while on duty at her office, Puan Rodziah bte Abdol Razak, the Welfare Officer Hulu Terengganu (the complainant) received a telephone call from a sister at the Maternity Ward, Hulu Terengganu Hospital informing her that the victim, Siti Nursapura bte Mohd Zandere (aged 13 years and 6 months on the date of the offence in the third charge), was admitted into the ward on the same date at about 5.35am, after having given birth to a baby boy on the same date. Apparently, the baby boy was born at about 4am on the same date at the victim's house. The victim was then admitted to the hospital together with her baby boy whose umbilical cord was still intact. The photographs of this baby boy appear at

p 33 of the appeal record. The complainant proceeded to the said ward and interviewed the victim. The victim told the complainant that the baby boy was born as a result of sexual intercourse between her and her father (the appellant). On the same date (11 July 2004), the complainant lodged a police report at about 3.30pm, vide Kuala Berang Report 854/2004.

[7] Police investigation in this case revealed the following:

(a) On one particular night between 16 October 2003 and 30 October 2003, while the victim was sleeping alone in a room at house No 4, Kampung Pelandan Tersat, Hulu Terengganu, the appellant came to the room and had sexual intercourse with the victim,

(b) On one particular night in the month of April 2004, while the victim was sleeping alone in a room in house No 4, Kampung Pelandan Tersat, Hulu Terengganu, the appellant came to the room and had sexual intercourse with the victim,

(c) On one particular night in the month of May 2004, while the victim was sleeping alone in a room in house No 4, Kampung Pelandan Tersat, Hulu Terengganu the appellant came to the room and had sexual intercourse with the victim.

[8] Investigation also revealed that the appellant had married the victim's mother on 20 August 1991. The victim was the eldest of the five children of the said marriage.

[9] Blood specimens of the appellant, the victim and the newly born baby boy was sent to Jabatan Kimia Malaysia, Petaling Jaya for DNA analysis.

[10] The results of the analysis indicated that the appellant was the biological father of the baby boy. The probability of paternity is 99.99%, as calculated on the Malaysian Malay data base.

[11] The appellant was arrested on 11 July 2004 at about 5pm.

[12] The brief facts of the case were admitted by the appellant. The learned sessions court judge accepted the appellant's plea of guilty, found him guilty and convicted him on each of the three charges. After hearing the appellant's plea in mitigation, the learned sessions court judge sentenced the appellant to 18 years" imprisonment and three strokes of the rotan on each of the three charges. The learned sessions court judge ordered the sentences on the three counts to run consecutively.

[13] In the petition of appeal supporting his appeal against the sentences, the appellant prayed that the sentences on him be reduced and be ordered to run concurrently. He said that he realised his mistake and promised not to repeat the same offence.

[14] The question I have to decide in this appeal is whether the learned sessions court judge had erred in principle in imposing on the appellant the sentences appealed against. Was there a failure on the part of the learned sessions court judge to apply the right principle (see *Abu Bakar bin Alif v R* [1953] MLJ 19)?

[15] In *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 delivering the judgment of the Federal Court, Raja Azlan Shah Ag LP (as he then was) said:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, *is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description?* I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. *It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.*
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> *For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise discretion.* (Emphasis added.)

[16] In his grounds of judgment, the learned sessions court judge said he had taken into the consideration all the relevant factors which should be considered in assessing sentence. He said he had considered the following factors:

(1) the appellant's plea of guilty,

(2) the fact that the appellant was a first offender,

(3) the appellant's plea that the sentence on him would cause hardship to his dependants — his wife and six children,

(4) seriousness/gravity of the offence.

[17] On the appellant's plea of guilty, the learned sessions court judge said that he had taken into consideration the fact that the said plea of the appellant had saved time and cost. However, he was of the view that that factor was negligible when compared with the grave nature of the offences committed. Similarly, he was of the view that the factor that the appellant was a first offender must give way to the element of public interest and the factor relating to the serious nature of the offences committed in the case. I do not think the learned sessions court judge had erred in taking that approach. Support for that approach may be derived from *Leo Say v Public Prosecutor* [1985] 2 CLJ 155 when NH Chan J said:

… The fact that a man has not much of a criminal record or none at all, is not a powerful factor to be taken into consideration in a case of such gravity … *Although all the three accused persons pleaded guilty and they are entitled to some credit for that, it must be set aside against the enormity and seriousness of the crime that they have committed.* (Emphasis added.)

[18] On the appellant's plea that long custodial sentence would cause hardship to his wife and six children whom he was supporting, the learned sessions court judge was of the view that it was not a strong factor to reduce sentence. He also said that the appellant should have thought of that before committing the offences. In support of his view the learned sessions court judge cited *R v Davies* (1978) 667 Cr Appeal Report 207 where Lawton LJ said:

… We have had to say in this court time and time again in the past that hardship to families is not a matter which in the ordinary way we can take consideration by way of reducing sentence.

[19] I agree with the view of the learned sessions court judge on this matter. Indeed, in *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186, Abdool Cader J (as he then was) said:

The respondent also puts forward in his plea in mitigation the fact that he is employed and supports an aged mother and step-brothers. He should of course have thought of this before committing the offences and not after; he is in fact pleading hardship arising from the consequences of his own acts and I would reiterate what I had occasion previously to observe in another case that an offender should not expect to excite or harness any sympathy on an *ipse dixit* by taking that stance of the impetuous youth who killed his parents with an axe and then pleaded in mitigation that he was an orphan.

[20] Further, in his grounds of judgment the learned sessions court judge said:

Selaras dengan prinsip penghukuman yang meletakkan faktor ini sebagai yang terpenting (antaranya kes *Lim Guan Eng v PP* [1998] 3 CLJ 769) bagi kes ini kepentingan awam merupakan faktor yang lebih diberikan keutamaan oleh saya dalam menjatuhkan hukuman berbanding kepentingan OKT. Peruntukan berhubung kesalahan di bawah Kanun Keseksaan telah dipinda yang mana hukuman yang boleh dikenakan bagi sabitan kesalahan serangan seksual telah dipinda kepada lebih berat. Satu kesalahan baru telah diwujudkan sepertimana seksyen 376B.

Berhubung tujuan suatu pindaan dibuat, YA Hashim Yeop A. Sani J dalam kes *Loo Choon Fatt v PP* [1978] 2 MLJ 265 memutuskan bahawa:

… The amendment passed by Parliament … reflect the public policy. It must be presumed that behind the policy is the consideration of public interest. The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem.

Oleh itu dalam kes ini walaupun OKT telah mengaku bersalah dan kesalahan merupakan kesalahan pertama beliau, atas kepentingan awam, saya menjatuhkan hukuman penjara dan sebatan rotan sepertimana di atas.

[21] I do not think that the learned sessions court judge could be faulted in holding the view as such. Indeed, the element of public interest should be the first and foremost in his mind (see *R v Ball* [1935]35, Cri App R 164, *Abu Bakar bin Alif v R* [1953] MLJ 19, *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14).

[22] Another factor considered by the learned sessions court judge which, together with the element of public interest, have tipped the scale in favour of the imposition of the sentences on the appellant was the very serious and odious nature of the offences committed by the appellant on his very young and innocent daughter resulting in the birth of the baby boy. In his grounds of judgment the learned sessions court judge said:

> Kesalahan sumbang mahram adalah suatu kesalahan yang serius dan amat keji lebih-lebih lagi di mana berlakunya kekerasan dan paksaan ke atas mangsa sepertimana dalam kes kita ini. Mangsa dalam kes ini telah terpaksa melalui proses melahirkan anak dalam usia yang begitu muda akibat dari perbuatan jijik dan tidak berperikemanusiaan OKT.
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> OKT yang sepatutnya menjaga dan membimbing mangsa sebaliknya menjadi perosak masa hadapan anak beliau sendiri semata-mata kerana memenuhi nafsu serakah beliau.
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> Masa depan mangsa ternyata akan menjadi amat malang dan malap memandang masyarakat yang mengetahui 'sejarah hitam' akan pasti memandang serong kepada beliau dan juga anak kelahiran beliau. Dalam hal ini kehidupan dan kehidupan dua orang yang tidak berdosa tersebut telah rosak akibat perbuatan OKT.
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> Oleh itu mahkamah perlu memainkan peranan yang sewajarnya bagi memastikan ianya tidak terus berleluasa dengan menjatuhkan hukuman yang setimpal dengan kesalahan yang telah dilakukan agar menjadi satu 'deterance' kepada mereka yang mempunyai keinginan untuk melakukan kesalahan yang serupa.

[23] I agree with the view expressed by the learned sessions court judge. Instead of discharging his responsibility as the victim's protector, the appellant had turned 'predator', preyed on his innocent daughter and unashamedly and mercilessly abused her. The trauma, the sufferings and the effects of the appellant's despicable acts on the victim is to my mind beyond imagination. No matter how strong the victim is, the nightmare of the sexual abuse by her own father would be haunting her for the rest of her life. She would have to live with this baby which was fathered by her own father and the boy would grow up to face the very sad and terrible truth that his grandfather was also his father.

[24] I have considered the appellant's plea in mitigation contained in his petition of appeal as well as what he pleaded before me in open court. I realise that the sentence imposed by the learned sessions court judge on the appellant on each of the three counts were almost the maximum sentence which could be imposed under s 376B of the Penal Code. I also realise that maximum sentence should be meted out for the worst possible example of the offence concerned. The prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious type of cases falling within the relevant class of offence meriting the maximum punishment prescribed (see *Loh Hock Seng & Anor v Public Prosecutor* [1990] 2 MLJ 13, at p 14, FC).

[25] The appellant pleaded that the sentences against him be reduced to the lightest possible under the circumstances. As I have stated earlier, he also prayed that the sentences against him be ordered to run concurrently. On the question whether sentences on an offender should be ordered to run concurrently or consecutively, the Court of Appeal, in *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534, said:

> The combined effect of s 282 and s 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v Public Prosecutor* [1990] 1 MLJ 88). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* [1964] Crim LR 482; *R v Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v PP* [1979] 2 MLJ 88; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v PP* [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v PP* [1992] 1 SLR 81 ap p 83:
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> > The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner* [1972] 56 Cr App R 594, *R v Wheatley* [1983] 5 Cr App R (S) 417 and *R v Skinner* [1986] 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentence may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.
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> In explaining the totality principle his Lordship referred (at p 85) to the view of DA Thomas in *Principles of Sentencing*, (2nd Ed) at pp 57–58:
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> > The many decisions of the court in which the totality principle has been applied to explain the reduction of a cummulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of sentence not in keeping with his record and prospects.
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> In this regard reference is also made to *Emmins on Sentencing* (2nd Ed), p 151:
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> > It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.
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> There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v R* [1991] 55 A Crim R 201). As O'Bryan J said in *Vitos v R* [1981] 4 A Crim R 238 at p 301:

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.
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> *Yong CJ said in that case that the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served by the circumstances of the case.* (Emphasis added.)

[26] In the appeal before me, the appellant had committed three distinct offences of incest. Although the victim in the three charges was the same and although the offences were perpetrated at the same place, they were perpetrated on three different dates within the period of about seven months. In my judgment, the sentences passed must truly reflect the fact that in this case the appellant had committed three distinct offences of incest and that he is being duly punished for the three distinct offences. This, to my mind, could only be achieved by ordering the three sentences to run consecutively. I realise that the term of 18 years imprisonment imposed on each count in this case was almost the maximum sentence which could be imposed for an offence of incest under s 376B. I also realise that the cumulative effect of the sentences on the appellant (18 years x 3) will have a crushing effect on the appellant. However, this must be balanced against the very grave nature of the offences committed by the appellant and the demand of public interest on this type of offences. Having said that I must add that there is nothing in the Penal Code or the Criminal Procedure Code to explain what sort of incest could be categorised as the worst possible example of the offence of incest under s 376B of the Penal Code. Section 376B of the Penal Code provides the minimum sentence of six years and maximum sentence of 20 years. In my view what could be considered as the worst possible example of the offence of incest under s 376B would depend on the facts and circumstances of each case. From the facts of this case which I have adverted to, I have no hesitation in concluding that the offences committed by the appellant were among the worst kind under s 376B of the Penal Code.

[27] The appellant had not given any explanation as to why he committed the offences, and I doubt he had any which could operate significantly to reduce the sentence. The offences committed by the appellant which by their very nature were despicable, were aggravated by the fact that he was not a bachelor or a person who had never experienced or tested the sweetness of a married life. He married the victim's mother on 20 August 1991. So he had been a married man about 12 years before the incest in the first charge was committed, and he was still married to the victim's mother on the date the three offences were committed.

[28] In my view, the offences committed by the appellant had outraged the feeling of the community, warranting even the maximum sentences to be imposed on him. Furthermore the prevalence of this type of offence must also be taken into consideration by the court in assessing sentence. In this case, public interest demands that sentences which shows the society's utter abhorrence for this type of offence be

passed. The sentences passed must serve as a plain warning that in this country the severest possible penalty awaits any person who commits incest. I am satisfied that the element of public interest and the consideration that the offences committed by the appellant were very grave must prevail, and override the crushing effect which the sentences will have on the appellant. In *Bachok Abdul Rahman v PP*, the accused pleaded guilty to a charge of rape of a child committed in the year 2001 and was sentenced by the sessions court to 18 years imprisonment and 12 strokes of the rotan. The sentence was ordered to take effect consecutively to a term of 16 years imprisonment which the accused was serving for another offence of rape. The accused appealed to the High Court which reduced the term of imprisonment to 15 years on the ground that the sessions court had failed to consider the guilty plea of the accused. The accused further appealed to the Court of Appeal. In its judgment the Court of Appeal said:

> It cannot be denied that the cumulative effect of both the sentences will have a crushing effect on the accused bearing in mind his age. But this effect must be balanced against the seriousness of the offences committed by the accused and the need to protect young females from him.

[29] The Court of Appeal also said that as the sessions court judge had acted properly in imposing the sentence that he did, that sentence ought not to have been disturbed by the High Court. However, since there was no appeal by the Public Prosecutor, the Court of Appeal did not accede to the Deputy Public Prosecutor's request for the reinstatement of the sentence imposed by the sessions court. In this context the Court of Appeal said:

> *As the sessions court judge had acted properly in imposing the sentence that he did it ought not to have been disturbed by the High Court.* There was, however, no appeal by the Public Prosecutor against the reduction of the sentence by the High Court. The learned Deputy Public Prosecutor invited us to reinstate the sentence imposed by the sessions court pursuant to s 60 of the Courts of Judicature Act 1964. This is a matter where the Public Prosecutor could have appealed but did not do so. It is our view that in such a situation the exercise of discretion under this provision of law is only appropriate upon sufficient cause being shown for the failure to appeal. This was not done. This, however, does not preclude the court from action of its own motion where it is desirable to do so in the interests of justice. The facts of this case did not warrant such an intervention by us. *In arriving at our decision we took into account the total of the two consecutive jail terms that the accused has to serve in accordance with the totality principal. While we are not prepared to say that the total of 34 years' imprisonment that the accused would have had to serve, if not reduced by three years by the High Court, is certainly not too much* bearing in mind the similarity of the system in which both the offences were carried out we were of the view that the reinstatement of the three years' imprisonment will not make a material difference to the 31 years' imprisonment that the accused already has to serve. Accordingly we declined to accede to the invitation of the learned Deputy Public Prosecutor. (Emphasis added.)

[30] In the case before me, the guilty plea of the appellant as well as all other aspects of his plea in mitigation was considered by the learned sessions court judge in assessing the sentences. For reasons which I have explained elsewhere in this judgment, I find that the learned sessions court judge had not erred in principle in imposing the sentences he did on the appellant.

A **[31]** In the result, the appellant's appeal was dismissed. The sentences passed by the learned sessions court judge were affirmed.

Appeal dismissed.

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Reported by Peter Ling

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